



STATE OF NEW JERSEY

In the Matter of Sekou Sheriff
Hunterdon Developmental Center,
Department of Human Services

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2018-1195
OAL DKT. NO. CSV 16989-17

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ISSUED: SEPTEMBER 7, 2018 BW

The appeal of Sekou Sheriff, Cottage Training Technician, Hunterdon Developmental Center, Department of Human Services, resignation not in good standing effective May 16, 2017, on charges, was heard by Administrative Law Judge Tricia M. Caliguire, who rendered her initial decision on August 1, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge’s initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge’s initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Sekou Sheriff.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSV 16989-17

AGENCY REF. NO. 2018-1195

**IN THE MATTER OF SEKOU SHERIFF,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.**

Rashida Hasan, Esq., for appellant

**Shareef Omar, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney
General, State of New Jersey, attorney)**

Record Closed: July 26, 2018

Decided: August 1, 2018

BEFORE TRICIA M. CALIGUIRE, ALJ:

STATEMENT OF THE CASE

This case involves the appeal by appellant, Sekou Sheriff (Sheriff), of the decision of respondent, New Jersey Department of Human Services (DHS or Department), that Sheriff's absence from the job on five consecutive days without permission was job abandonment, resulting in Sheriff's resignation not in good standing from the position of Cottage Training Technician at the Hunterdon Developmental Center (HDC).

PROCEDURAL HISTORY

On March 24, 2017, DHS mailed a Preliminary Notice of Disciplinary Action (PNDA) dated March 10, 2017, to Sheriff, charging him with (1) job abandonment in violation of Administrative Order A3.1; (2) resignation not in good standing pursuant to N.J.A.C. 4A:2-6.2(c); (3) conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and (4) other sufficient causes pursuant to N.J.A.C. 4A:2-2.3(a)(12). Sheriff did not request a departmental hearing, and, on April 17, 2017, DHS mailed a Final Notice of Disciplinary Action (FNDA) dated April 12, 2017, to Sheriff, sustaining all charges against him, with notice that he would be removed from employment effective February 19, 2017. Both the PNDA and the FNDA were sent by certified mail to the last address Sheriff provided, but both mailings were returned unclaimed.

Sheriff attempted to return to work on October 23, 2017, at which time he was provided with courtesy copies of the PNDA and FNDA. Sheriff filed this appeal on October 24, 2017, and the Civil Service Commission (CSC) transmitted this matter on November 14, 2017, to the Office of Administrative Law (OAL), which filed it for determination as a contested case on November 15, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

This matter was initially assigned to the Honorable Gerald Foley, ALJ, who held a settlement conference with the parties on December 19, 2017. Since settlement was not reached, this matter was reassigned to the undersigned and scheduled for a prehearing telephone conference on January 29, 2018. At appellant's request, this conference was adjourned. I held prehearing telephone conferences with the parties on February 26, 2018, and May 8, 2018, after which I issued a prehearing order and scheduled the hearing for July 30, 2018.

On June 27, 2018, respondent filed a motion for summary decision in its favor claiming there are no genuine issues of material fact in dispute. Specifically, respondent seeks that summary decision be granted in its favor finding that Sheriff's appeal was not filed in a timely manner and must be dismissed and, in the alternative, that Sheriff is guilty of the charges

described in the FNDA, and that DHS properly recorded him as having resigned not in good standing. Accordingly, I adjourned the hearing to allow time to address the motion.

On July 20, 2018, Sheriff submitted a brief in opposition to the motion for summary decision. The DHS filed a reply brief in further support of the motion for summary decision on July 26, 2018, and the motion is now ripe for determination.

FACTUAL DISCUSSION AND FINDINGS

Based on the papers filed by the parties in this case, I **FIND** the following undisputed **FACTS**:

Sheriff was employed by DHS as a Cottage Training Technician at HDC since 2003. On or about December 20, 2016, a leave request submitted by Sheriff was approved by his supervisors at HDC by which Sheriff used vacation and administrative leave from January 14, 2017 through February 2, 2017. Sheriff was expected to return to duty on February 6, 2017. Letter Br. of Resp't. (June 27, 2018), Exhibit B.

Sheriff did not return to work on February 6, 2017, and his absence was noted as unauthorized. Id., Exhibit C. The next two days, Sheriff called out sick. Ibid. On February 8, 2017, Violet H. Savice (Savice), LPN/CM, transmitted to HDC an application for Sheriff to take medical leave pursuant to the Family and Medical Leave Act.¹ Id., Exhibit D. In this application, Savice described Sheriff's medical condition as hypertension and diabetes and estimated he would be incapacitated from February 3, 2017, through March 15, 2017. Ibid. On February 13, 2017, HDC sent notice to Sheriff that his FMLA application was not approved as additional information was needed to determine whether the FMLA applied to his request. Id., Exhibit E. HDC required Sheriff to respond on or before February 21, 2017, but failed to specify what information was missing from his initial application. Ibid.

¹ 29 U.S.C.A. 2601, et seq.

On February 15, 2017, Gemeh Kesselhe (Kesselhe), Attending Medical Officer at Redemption Hospital, Monrovia, Liberia, transmitted a medical report to HDC regarding Sheriff, which stated that he was seen in the Emergency Room on February 3, 2017, diagnosed with diabetes and hypertension, admitted to the hospital for one week, and advised to "suspend travel" until March 15, 2017. Id., Exhibit F. On March 24, 2017, Kesselhe transmitted a second medical report to HDC regarding Sheriff, which stated that his recovery had been "gradual, not as anticipated," and therefore, Sheriff was "further admonished to suspend travel" through May 15, 2017. Id., Exhibit G. Respondent provided no copies of additional correspondence, if any, generated by HDC in response to the doctor's reports described above.

In the PNDA and the FNDA, DHS claims that Sheriff failed to notify his supervisor of his intended absences and failed to report to work on February 19, 21, 22, 23, and 26, 2017, and all subsequent work days up to and including March 10, 2017, and then April 12, 2017, the dates of the PNDA and FNDA, respectively. Id., Exhibits H and I.

HDC sent both the PNDA and the FNDA to Sheriff by certified mail to the address in Newark, New Jersey, which Sheriff had provided, however, both certified mailings were returned to HDC unclaimed by Sheriff. Ibid. In the papers filed to support this motion, respondent first stated that the PNDA and FNDA were also sent to Sheriff by regular mail. Id., p. 4. In its reply brief, however, respondent stated that the documents were also sent to Sheriff by registered mail. Reply Br. of Resp't. (July 26, 2018), p. 2. Sheriff claims he did not receive either the PNDA or the FNDA prior to October 23, 2018.

Sheriff was last seen by Kesselhe at his office in Liberia on September 24, 2017, at which time Kesselhe issued a medical report stating that Sheriff "can now resume active job as required." Letter Br. of Appell't. (July 20, 2018), Appendix A. Sheriff presented this report to HDC in person on or about October 23, 2017.² Further, Sheriff presented HDC the report of Total Medical Support Group, Irvington, New Jersey, that he was cleared to return to work, effective October 16, 2017. Letter Br. of Resp't., Exhibit M.

² The record is not clear as to whether Sheriff returned to HDC on only one or more than one occasion in his attempt to resume working.

Respondent did not permit Sheriff to return to work and, instead, on October 23, 2017, provided him with “courtesy copies” of the PNDA and FNDA. Id., Exhibits K and L. On October 24, 2017, Sheriff appealed the decision of respondent to record his resignation not in good standing.

POSITIONS OF THE PARTIES

Respondent claims first that Sheriff’s appeal is untimely and therefore, should be dismissed. According to respondent, the CSC improperly granted Sheriff’s appeal “based on the handwritten date on the courtesy copy of the FNDA” which Sheriff obtained when he returned to HDC in October 2017, seven months after the FNDA was issued. Id., p. 6. In support of its position, respondent cites the statute which provides that appeals of removals must be “made in writing to the [CSC] no later than 20 days from receipt of the final written determination of the authority.” N.J.S.A. 11A:2-15. Respondent contends that “there is nothing in HDC’s records suggesting Appellant’s change of address, or that the FNDA was not delivered to him.” Letter Br. of Resp’t., p. 7.

Appellant responds that respondent failed to effectuate personal service of the PNDA and/or the FNDA on Sheriff and should not be permitted to proceed with this matter. “Service by certified or registered mail also require proof of such service,” which respondent does not provide. Letter Br. of Appell’t., p. 3. Regular mail, which respondent initially claimed to have used, cannot substitute for personal service or service by certified or registered mail. Ibid.

In its reply brief, respondent claims for the first time that the PNDA and FNDA were sent to appellant by certified and registered mail. Reply Br. of Resp’t. (July 26, 2018), p. 2. (Presumably, though respondent does not say that it erred in its initial statement that regular mail was used, respondent means to substitute “registered” for “regular” with respect to the form of mailing.) Respondent refers to the green return-receipt card on which the boxes for both certified and registered mail are checked, and claims it satisfied its notice obligations. Id.; Letter Br. of Resp’t., Exhibit J.

Alternately, respondent claims it is entitled to summary decision because there is no genuine issue of material fact that Sheriff abandoned his job while abroad in Liberia. Even if the medical reports provided by Sheriff's Liberian doctor are presumed credible, respondent argues that Sheriff was cleared to return to work twice—on March 15, 2017, and then again on May 15, 2017—but did not return nor request additional leave. The next correspondence from Sheriff and/or his doctors was dated September 24, 2017, and received by HDC on October 23, 2018, more than five months after Sheriff had previously been cleared to return to work.

Respondent argues that HDC is a twenty-four hour psychiatric care facility which “relies on the diligence of its employees to remain in operation.” Employee attendance policies are strictly enforced and “DHS policy mandates automatic removal for a first offense of job abandonment.” See, Letter Br. of Resp't., Exhibit A (NJ DHS Disciplinary Action Program (January 1, 1981), p. 4). Further, DHS policy defines job abandonment as “absence from work as scheduled without permission for five (5) consecutive days.” Ibid.

In response, appellant claims that summary decision is not appropriate as there is a genuine dispute as to whether HDC had sufficient reason to deny FMLA leave to Sheriff and whether HDC had effective notice of the basis for Sheriff's continuing absences.

Finally, respondent argues that even if Sheriff had produced the medical report dated September 24, 2017, when it was initially issued rather than in October 2017, neither Sheriff nor his doctor provided any communication to HDC between May 15, 2017, and October 23, 2017, a gap of more than five months. Appellant has yet to explain why he did not notify his supervisors, or request permission for his absence, after May 15, 2017, or why he waited for almost a month after being cleared to return to work in September 2017, to attempt to return to work in October 2017.

LEGAL ANALYSIS AND CONCLUSIONS

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute.

By applying the applicable law and standard of proof to the undisputed facts, a decision may be reached in a case without the necessity of a hearing at which evidence is presented and testimony taken. The procedure is equally applicable in judicial as well as executive branch administrative proceedings. N.J.A.C. 1:1-12.5.

The regulations provide that the decision sought by the movant "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). For the adverse party (in this case, Sheriff) to prevail, he "must set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

The standards for determining motions for summary judgment are found in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74–75 (1954), and later in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A motion for summary decision may only be granted where the moving party sustains the burden of proving "the absence of a genuine issue of material fact," and all inferences of doubt are drawn against the movant. Judson, 17 N.J. at 74-75. The existence of disputed facts will only prevent summary decision if the disputed facts are material to the application of the underlying charges. Frank v. Ivy Club, 120 N.J. 73, 98 (1990).

Summary decision is appropriate when "the evidence . . . is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 541 [quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)]. In reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at trial on the merits.

The respondent contends that removal from employment was the appropriate response to appellant's absence from duty for five or more consecutive business days without approval. Under the regulations, such an absence is considered abandonment of the employee's position and is recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b). Further, the violation by an employee of a rule, regulation, policy, procedure, or order,

such as the DHS Disciplinary Action Program, provides the employer other sufficient cause to impose discipline, pursuant to N.J.A.C. 4A:2-2.3(a) (12).

Respondent argues that summary decision is appropriate here for two reasons, first Sheriff's appeal was not timely filed; and second, Sheriff was absent from work without permission for five or more consecutive work days, which by DHS policy constitutes job abandonment and for which automatic removal from employment is mandated.

With respect to respondent's first argument, it must prove that there is no genuine issue of material fact as to whether Sheriff had notice of the charges lodged against him—and of his recorded resignation not in good standing—more than twenty days prior to October 24, 2017. Respondent states that there is nothing in HDC's records suggesting that the FNDA was not delivered to Sheriff. But, to date, respondent has shown nothing in HDC's records to prove that either the PNDA or the FNDA were delivered to Sheriff prior to October 23, 2017. In fact, it appears that HDC staff wrote "returned unclaimed" on copies of both documents. See, Letter Br. of Resp't., Exhibits H, I, K, and L.

In its initial brief, respondent stated that the PNDA and FNDA were sent by regular and certified mail, but in its second brief changed this to registered and certified mail. A review of the exhibits raises even more uncertainty. The FNDA was issued on April 12, 2017, and sent by certified or registered mail on or about the same day, with a receipt numbered 7015 3010 000056941912. Id., Exhibit I. The green card which accompanied that mailing bears the same receipt number and was return to HDC with no delivery date indicated and no signature. Id., Exhibit J. Both the boxes for certified mail and registered mail are checked on the green card; both types of mail require a signature of the recipient. Both the FNDA and the green card bear the handwritten note, "sent reg mail 4/17/17." If the "reg" meant registered rather than regular, there should be a second green card with a new receipt number and respondent has not provided one.³ I **CONCLUDE** that when considering the evidence in a light most favorable to appellant, questions remain as to whether he obtained

³ A review of the PNDA exhibits shows the same issues.

actual notice of the PNDA and/or the FNDA prior to October 23, 2017, when he was given courtesy copies of both documents by HDC staff.

There is nothing from the CSC proving that the agency determined that the deadline for filing the present appeal was based on the date HDC gave Sheriff the courtesy copies of the PNDA and FNDA. However, the inference to be drawn from the CSC's transmittal of Sheriff's appeal to the OAL is that the CSC found the appeal timely. I **CONCLUDE** that when considering the evidence in a light most favorable to appellant, this appeal was timely filed with the CSC, less than twenty days from the date Sheriff had actual notice of the recording of his resignation not in good standing.

As to the second issue, whether Sheriff was absent from work without permission for five or more consecutive days, when the evidence is viewed in a light most favorable to appellant, there are genuine issues as to material facts but only as to the period prior to May 15, 2017.

Sheriff requested FMLA leave on February 8, 2017. Although respondent notified appellant less than one week later that this leave was not yet approved, respondent failed to advise Sheriff as to the basis for rejecting his application or what specific additional information was needed.⁴ Prior to the deadline for responding, Sheriff's doctor sent additional information to HDC, specifically that Sheriff was recovering slowly and was advised not to travel prior to March 15, 2017. At that point, HDC knew why Sheriff was absent from work and knew when he was expected to return. As appellant argues, there are genuine issues as to whether HDC had sufficient reason to deny Sheriff's application for FMLA, or if HDC even did officially deny the application. Significantly, respondent provides no evidence of any response to either Sheriff or Kesselhe, raising the question of whether Sheriff was reasonable in presuming that his leave was approved through March 15, 2017.

⁴ In its brief, respondent notes that Sheriff's FMLA application "does not explain how [diabetes and hypertension] prevented [him] from traveling or working," but respondent offers no proof that this information was requested by HDC at any time. Letter Br. of Resp't., p. 3.

On March 24, 2017, Kesselhe sent a new medical report to HDC, stating that Sheriff could not travel until May 15, 2017. Again, respondent provides no evidence of any response by HDC. By this time, of course, DHS had already issued the PNDA to Sheriff, but as he claims not to have had notice, he may have reasonably presumed that the second medical report was sufficient to extend his FMLA leave through May 15, 2017.⁵ Sheriff has offered no evidence, however, to support the conclusion that he provided any notice to HDC of his intention to extend his medical leave after May 15, 2017, nor has Sheriff offered any evidence that HDC expressly or implicitly approved such an extension.

Even when considering the undisputed facts in the light most favorable to Sheriff, he has provided no reasonable explanation for his failure to report to work and/or to notify his supervisor of his inability to so report between May 15, 2017, and October 23, 2017. As respondent states, a twenty-four-hour facility like HDC relies on the diligence of its employees to remain in operation and, for this reason, DHS policy mandates removal for a first offense of job abandonment. Sheriff was absent without permission for much longer than five consecutive days; when considering the facts in the light most favorable to him, I **CONCLUDE** that Sheriff was absent without permission every work day over the course of five months, a violation of N.J.A.C. 4A:2-2.3(a)(6) and (12) and of the DHS Disciplinary Action Program.

For the reasons described above, I **CONCLUDE** that the decision of DHS to record Sheriff's resignation not in good standing is appropriate but modify the effective date of appellant's removal to May 16, 2017, the first work day after the date on which Kesselhe advised HDC that Sheriff could travel, a prerequisite for his return to work.

⁵ Neither party provided any information regarding the amount of FMLA leave time that would have been available to appellant at the time of his initial application, or whether such leave time would have been exhausted prior to May 15, 2017.

ORDER

I hereby **ORDER** that the decision of the **DEPARTMENT OF HUMAN SERVICES** that Sheriff's absence from the job on five consecutive days without permission was job abandonment resulting in his resignation not in good standing is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

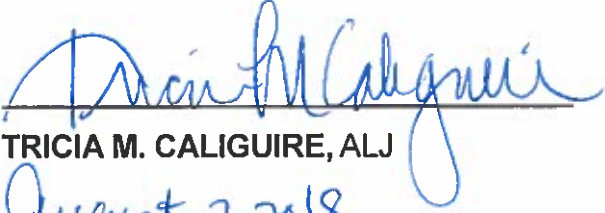
August 1, 2018

DATE

Date Received at Agency:

Date Mailed to Parties:

nd



TRICIA M. CALIGUIRE, ALJ
August 2, 2018

August 2, 2018
